Nos. ~~92-1292~~ and 92-1485

In The

Supreme Court of the United States

October Term, 1992

PONY EXPRESS COURIER CORP.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT L. THOMPSON
DAVID M. VAUGHAN
800 Peachtree-Cain Tower
229 Peachtree St., N.E.
Atlanta, Georgia 30303
(404) 659-6700

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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The Petitioner, Pony Express Courier Corp., again respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit rendered on December 10, 1992.

OPINION BELOW

The opinion of the Court of Appeals, reported at 981 F.2d 358, appears in the Appendix submitted as part of the petition for writ of certiorari filed with this Court on March 10, 1993 (A. 1-18). The decision and order of the Respondent, National Labor Relations Board, reported at 306 NLRB No. 22, and the Board Regional Director's

unreported decision and direction of election in the underlying representation case both appear in the aforementioned Appendix (A. 21-43).[1] On or about May 10, 1993, the Board filed it's brief in opposition contending that the petition for certiorari should be denied. This reply brief is submitted pursuant to Rule 15.6, Rules of the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

In the petition for writ of certiorari, Pony argues that the recent decision of the Eighth Circuit Court contravenes a 1984 holding of the Second Circuit Court which dealt directly with the application of Section 9(b)(3) guard status to "Courier Guard" employees (Pet. 14-18). Further, Pony argues that the Board's new standard for determining guard status, as enunciated in its 1990 *Purolator IV* decision and the instant case, is a "marked departure" from past Board decisions on this subject and is clearly inconsistent with the legislative purpose and policy of Section 9(b)(3) of the Act (Pet. 18-29).

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[1] Again, for convenience, Petitioner is hereinafter referred to as "Pony" or "Pony Express"; Respondent National Labor Relations Board is hereinafter referred to as the "Board"; and Teamsters Local 120, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (charging party in the proceedings before the Board), is hereinafter referred to as the "Union." References to the "Act" are to the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*

I. Decision of the Eighth Circuit Court in Conflict with Earlier Decision of Second Circuit Court that Courier Guards are Section 9(b)(3) Guards.

Pony argues in its petition that the 1984 decision of the Second Circuit in *Local 851, International Brotherhood of Teamsters v. NLRB*, 732 F.2d 43 (2d Cir. 1984), is the only other appellate court decision "dealing directly with the application of Section 9(b)(3) to Courier Guard employees;" that the Eighth Circuit's recent decision upholding the Board's *Purolator IV* rationale on 9(b)(3) guard status is "now in direct conflict with the earlier decision;" that this Section 9(b)(3) issue is "likely to reoccur in these and other appellate circuits;" and that the "instant conflict is one that can only be resolved by the Supreme Court" (Pet. 17-18). In opposition, the Board contends that the Eighth Circuit's holding is not in conflict with the earlier decision of the Second Circuit in that the "job duties of the courier-guards found to be statutory guards in Local 851 differ significantly from those of petitioner's employees" (Board Brief 15). This contention, we submit, is without merit.

In Local 851 the Second Circuit Court was satisfied that the Board's initial finding that the Purolator drivers were Section 9(b)(3) guards was supported by substantial record evidence; and that court, in applauding the Board's 30-year "consistent interpretation . . . of the statutory term to encompass more than plant guards" described the drivers' job duties as follows:

> The union contends that the board's interpretation of § 9(b)(3) contravenes both the legislative history and purpose of that statute, because the Purolator employees do not "guard" any property, but are merely truck drivers employed by Purolator. The board and Purolator contend that the drivers are "guards" because, although

> unarmed, they wear uniforms, are entrusted with a wide variety of valuable commodities ranging from cash letters to controlled drugs and radioactive pharmaceuticals, are bonded and subjected to security clearance, are often given keys to the premises and security vaults of customers, are held responsible for the safekeeping of packages in their vehicles, and are required to insure that their entry or departure does not impair the security of customers' premises.

732 F.2d at 44

The Board concedes that Pony's Courier Guards – like those in the Local 851 case – are "entrusted with a variety of valuable goods," but then contends incorrectly that the "similarity in their respective duties ends there" (Board Brief 16). The Board argues that Pony's Courier Guards are "not given keys to access a substantial number of customers' premises;" that the "record does not demonstrate that (Pony's) courier-guards have access to customers' security vaults;" that Pony does not "hold its courier guards responsible for safekeeping of packages in their vehicles;" and, further, Pony's Courier Guards "generally disregard the company rule requiring them to keep their delivery vehicles locked at all times" (Board Brief 16). However, such arguments by the Board ignore much of the record evidence, as did the Regional Director in his June 1991 decision and direction of election.

First of all, the fact that Pony had a limited number of keys and secret codes for gaining access to customers' premises during their non-work time in 1991 did not establish that they were in use only a small percentage of the time. Moreover, a Section 9(b)(3) analysis is not quantitative but qualitative, and the limited performance of property protection duties during working time should

not detract from an employee's guard status. Until the *Purolator IV* decision in 1990, the Board had consistently held that mere part-time performance of protective and enforcement duties, which creates the threat of divided loyalty, brings an employee within the purview of the purpose and policy of Section 9(b)(3).[2] It is the nature of the job duties of the Courier Guards and not the percentage of time that they spend performing such duties which should be controlling in determining 9(b)(3) guard status.

Also, the fact that a Pony Courier Guard may seldom be called upon to deactivate a customer's alarm system when entering the premises, or reactivate it upon leaving, should not detract from his express responsibility to secure the customer's premises and property when entering and leaving during non-working hours. As the Board's representation case record shows, over half of all pick-ups and deliveries are made *before* and *after* a customer's normal business hours, and such pick-ups and deliveries are normally made in controlled-access areas not open to the public during those times, thus necessitating the need for access keys and codes. The fact that a Pony Courier Guard may not have direct access to a customer's security vault while on the premises is immaterial.

Similarly, the contentions that Pony does not hold its Courier Guards "responsible for safekeeping of packages in their vehicles," and that said Courier Guards "generally disregard the company's rule requiring them to keep

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[2] See, e.g., *A.W. Schlesinger Geriatric Center*, 267 NLRB 1363 (1983); *Raymond Metal Products Co.*, 223 NLRB 127 (1976); *Reynolds Metals Co.*, 198 NLRB 120 (1972); *Walterboro Manufacturing Co.*, 106 NLRB 1383 (1953).

their delivery vehicles locked at all times" is likewise unsupported by the record. Pony Courier Guards have been instructed that vehicle doors and windows are required to be closed and locked when said vehicles are left unattended, and all keys are to be taken by the Courier Guard when he leaves his assigned vehicle. It is a published security rule violation, for which disciplinary action may be taken, to leave a courier vehicle unlocked during a route. The fact that one pro-union Courier Guard (Dorton) chose to violate this rule by leaving his vehicle "unlocked with the engine running during brief stops" does not warrant the broad conclusion that, in practice, all Pony Courier Guards are equally as careless and indifferent to the security of their assigned cargoes.

The job duties and responsibilities of Pony Courier Guards in the case *sub judice* are very similar to those of the Purolator courier-guards found to be 9(b)(3) guards in the 1984 Second Circuit decision and, most importantly, the basic function of both groups of employees "involved, directly and substantially, the protection of the valuable property" of their respective employer's customers. *Purolator Courier Corp.*, 266 NLRB 384, 385 (1983), affirmed 732 F.2d 43 (2d Cir. 1984). Clearly, there is a conflict between the decisions of the Second and Eighth Circuits which should be resolved by the Supreme Court.

II. Decision of the Eighth Circuit Court is Appropriate for Supreme Court Determination Because Issues Raised in this Case Present Substantial Questions with Regard to National Labor Policy.

The Board contends that Pony is "jurisdictionally barred" from arguing that the *Purolator IV* decision represents a "departure" by the Board from its earlier case

precedent and that it conflicts with the legislative purpose of Section 9(b)(3), contending that this legal challenge was not raised before the Board during its proceedings and may not now be considered by this Court, absent extraordinary circumstances, pursuant to Section 10(e) of the Act (Board Brief 9-10). However, it is submitted that Pony has adequately preserved this issue for review.

Section 10(e), 29 U.S.C. § 160(e), was enacted to ensure that the Board has an opportunity to apply its special expertise to an issue before that issue is presented to an appellate court. See *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 256 (1943) (per curiam); *NLRB v. Best Products Co.*, 765 F.2d 903, 909 (9th Cir. 1985). Section 10(e) bars judicial review when no objection has been filed, see *Woelke and Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); or when only an ambiguous, general objection to the decision has been filed, see *Marshall Field*, 318 U.S. at 255-56. However, an objection will meet the statutory requirement if it is not "so ambiguous as to be totally ineffective to adequately apprise the Board" that the issue is disputed. *Best*, 765 F.2d at 909. Once an issue is raised before the Board, any party may litigate the issue on appeal. See *Consolidated Freightways v. NLRB*, 669 F.2d 790, 794-95 (D.C. Cir. 1981).

In its June 1991 request for review of the Regional Director's decision and direction of election, Pony argued that his decision "raises a substantial question of law or policy because of his clear departure from officially reported Board precedent on . . . the Section 9(b)(3) guard issue . . . " as well as containing "erroneous findings on substantial factual issues that prejudicially affect the rights of the employer." In arguing a departure from

"officially reported Board case precedent," Pony pointed out that, in all material respects, the "factors and job responsibilities of courier-guards in the New Brighton Branch are virtually identical with those employees found to be 9(b)(3) guards in earlier Board cases," citing the three *Purolator* cases of the early 1980s as well as *MDS Courier Service, Inc.*, 248 NLRB 1320 (1980) and *Brinks Incorporated*, 226 NLRB 1182 (1976). However, the Board denied Pony's request for review on the ground that it "raises no substantial issues warranting review". Thereafter, in its December 1991 response to the Board's order to show cause as to why summary judgment should not be granted, Pony again argued that the "Regional Director's decision raised substantial questions of law or policy because of his departure from officially reported Board precedent on both the Section 9(b)(3) guard issue and the Section 2(11) supervisory issue . . . ". It is submitted that, by advancing this argument in these briefs, the ultimate question of the reasonableness of the Board's *Purolator IV* decision was implicitly raised at each step of the Board's representation and unfair labor practice proceedings and was preserved for review by both the appellate court and this Court. *See* e.g., *NLRB v. U.S. Postal Service*, 833 F.2d 1195, 1202-1203 (6th Cir. 1987); *NLRB v. Wayne Transp., a Division of Wayne Corp.*, 776 F.2d 745, 748-49 (7th Cir. 1985); *NLRB v. Southwest Security Equipment Corp*, 736 F.2d 1332, 1336 (9th Cir. 1984), *cert. den.*, 470 U.S. 1087 (1985); *Amcar Division v. NLRB*, 596 F.2d 1344, 1350, n. 8 (8th Cir. 1979).

The Board further contends that the *Purolator IV* standard does not represent a "basic change" in Board policy with respect to the status of courier-guards under Section 9(b)(3), but "simply refines that policy;" and, further, that

even if the *Purolator IV* standard is deemed a revision of policy, the Board has the authority to modify its construction of Section 9(b)(3) so long as that modification is "rational and consistent" with the Act (Board Brief 10-13). However, the Board's argument studiously ignores the background and history of Section 9(b)(3) which was enacted by Congress in 1947 because of the potential divided loyalty problem that still exists today in the security industry of which Pony Express is an integral part. A review of Board decisions on the guard status of courier employees for the period of 1976-1990, including the three *Purolator* decisions of the early 1980's, clearly shows that the *Purolator IV* standard is a significant change in Board policy and more than just a refinement or reaffirmation of its existing policy (Pet. 15-16). The Board's decisions in *Purolator IV* and the instant case invite a narrower quantitative analysis of the duties of a courier-guard which, in effect, erodes the legislative purpose of Section 9(b)(3), i.e. minimizing the potential danger of divided loyalties in employees "vested with the authority to enforce rules and regulations for the protection of company property." *McDonnell Aircraft Company v. NLRB*, 827 F.2d 324, 326 (8th Cir. 1987).

Certainly, the Board has the power the change its construction of Section 9(b)(3), but that change must be reasonable and not inconsistent with the statutory interpretation of that provision of the Act. Section 9(b)(3) defines a "guard" as "any individual employed . . . to enforce against employees and other persons rules to protect property of the employer . . . ," 29 U.S.C. § 159(b)(3); and the Board has long held that it is immaterial that the individual protects property belonging to the employer's customers rather than to his employer

while not on the premises of his employer.[3] The "appropriate categorization of employees as statutory guards will depend largely on the extent to which they protect [company] property." 827 F.2d at 326. See, also, *NLRB v. Brinks, Inc. of Florida*, 843 F.2d 448, 451-52 (11th Cir. 1988); *Truck Drivers' Local Union No. 807 v. NLRB*, 755 F.2d 5, 8-11 (2nd Cir. 1985); *International Brotherhood of Teamsters, etc. v. NLRB*, 568 F.2d 12, 16 (7th Cir. 1977). The Board's new restrictive interpretation of Section 9(b)(3), as articulated in *Purolator IV* and the instant case, is unreasonable and clearly inconsistent with the purpose and policy of that statutory provision. Section 9(b)(3) defines guards in all industries, yet the Board has now articulated a different standard depending on the type of business engaged in by the subject employer. It is submitted that Section 9(b)(3) should be clarified by this Court to provide uniformity in its application to employers in the security industry and other industries.

CONCLUSION

For the reasons discussed herein, as well as in the petition filed on March 10, 1993, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

ROBERT L. THOMPSON
DAVID M. VAUGHAN
ELARBEE, THOMPSON & TRAPNELL
800 Peachtree-Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
Counsel for Petitioner

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[3] See *Armored Motor Services Co.*, 106 NLRB 1139, 1140 (1953).